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CASE NO. 00-337

Supreme Court, U.S.
FILED
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CLERK

IN THE SUPREME COURT OF THE UNITED STATES

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**LEO HISE and JACK ISCH,** individually and as representatives of a class of others similarly situated,

*Petitioners*,

v.

**PHILIP MORRIS INCORPORATED** (a Virginia Corporation), **R. J. REYNOLDS TOBACCO COMPANY** (a New Jersey Corporation), **BROWN & WILLIAMSON TOBACCO CORPORATION** (a Delaware Corporation), **LORILLARD TOBACCO COMPANY** (a Delaware Corporation) and **THE LIGGETT GROUP d/b/a LIGGETT AND MYERS TOBACCO COMPANY** (a Delaware Corporation),

*Respondents*.

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**On Petition for a Writ of Certiorari To The United States Court of Appeals for the Tenth Circuit**

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# BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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**CORPORATE DISCLOSURE STATEMENT FOR LIGGETT GROUP, INC.**

Liggett is an indirect subsidiary of Brooke Group Ltd., a company listed on the New York Stock Exchange.

## SUMMARY OF ARGUMENT

***Illinois Brick* "indirect purchaser" argument.** Under *Illinois Brick*, consumers, such as Plaintiffs, can not sue manufacturers for increased prices that are passed through to consumers through retailers or distributors. There is a recognized exception for "cost plus" contracts that force an automatic pass-through of increased prices to the consumer. Cigarette consumers, such as Plaintiffs, can not make use of this "cost plus" exception. The Defendants are tobacco manufacturers who sell their product through distributors and retailers. If Defendants raise the price for tobacco products, there is no automatic rise in the price of cigarettes to the consumer. The distributor or retailer may, or may not, raise the price of cigarettes in lock-step with the rise in tobacco costs. Allowing this action to proceed would defeat the purpose of the *Illinois Brick* rule.

***Noerr-Pennington* argument.** The *Noerr-Pennington* doctrine protects defendants from anti-trust actions based upon the defendant's actions in "petitioning" the government. The doctrine has its basis in the right to petition the government. There are three levels of "petitioning" that are present in this case. One, the subject settlement agreements arose out of the defendants' defense of the underlying action brought by the Attorneys General, and the defendants were "petitioning" the court to deny the States' claims. Two, the settlement agreements were consummated after the defendants "petitioned" the State Attorneys General Plaintiffs to settle the underlying case. Three, the settlement agreements were then presented to the courts of the various States, and each court confirmed the settlements by consent decree. Plaintiffs seek redress against these private Defendants because the Defendants participated in a successful attempt to procure a court order. This is a collateral attack on the underlying consent decrees, without joining the States that are on the "other side" of these consent decrees. In any event, Defendants had an objectively reasonable basis to believe that this settlement process was valid.

**"Illegal Compact" argument.** This novel Constitutional argument was not presented below, but was raised for the first time on appeal. In the trial court the Plaintiffs only argued that the settlement agreement constituted an illegal "confederacy" of the States under Art. 1, Sec. 10, cl. 1 of the United States Constitution. Now their argument is based upon Art. 1, Sec. 10, cl. 3, the "interstate compact" clause. The settlement agreements do not violate the interstate compact clause. These settlement agreements are, at their base, agreements between the States and the Defendants. They combine into one document what could have been agreed to separately. Otherwise, there would be no way that more than one State could enter into litigation, as there would be no way to "settle" the litigation by agreement, short of an Act of Congress.

**The "conversion to Summary Judgment" argument.** The Trial Court converted the Motions to Dismiss to Summary Judgments after giving both sides notice of the conversion, and giving each side certain time to file additional factual assertions to support their case. Plaintiff chose to file no factual assertions. Plaintiff complains because Defendants' facts were not "numbered." Numbering is not a requirement of Rule 56 and no numbers causes no prejudice. Plaintiff complains because Defendants' facts were "self-serving." If that is so, Plaintiff has not identified any such "fact" that caused them prejudice, and, as the trial court pointed out, most of Defendants' assertions were based upon the plain language of the settlement agreements.

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## ARGUMENT

**1. Response to Petitioner's Illinois Brick "indirect purchaser" argument. The Illinois Brick rule prohibits consumers, such as the Plaintiffs, from proceeding against manufacturers for increased costs that are passed on through distributors and retailers. Plaintiffs' proposed new "exception" should be rejected.**

Throughout this Brief, Petitioners may be referred to as "Plaintiffs," and Respondents may be referred to as "Defendants."

This Court, in *Illinois Brick Co. v Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), held that "indirect purchasers" (such as the ultimate consumer), could not bring antitrust damage actions against manufacturers for alleged price increases. Only the overcharged direct purchaser (such as the retailer who buys from the manufacturer) has standing to sue for such damages. Plaintiffs can not offensively use a "pass on" theory to show that a manufacturer's increased prices were passed on, through the distribution chain, to the indirect purchaser's damage. The primary rationale for this holding was that it would create a serious risk of multiple liability for defendants. If the indirect purchaser recovered part of the overcharge by asserting that part of it had been passed on to him, the direct purchaser could still recover the full amount of the overcharge, since the defendant would not be allowed to assert pass on as a defense. Further, the Court worried that tracing the complex economic adjustments in sales price, due to an increase in expenses at the manufacturing level, would complicate antitrust damage proceedings.

This Court admitted to two potential "exceptions" to the rule against suits by indirect purchasers. One exception, not applicable here, is the "owned or controlled by" exception. The second potential *Illinois Brick* exception is the "pre-existing cost-plus contract" exception. If the direct purchaser (for example, the retailer), is locked into a fixed quantity contract with the ultimate consumer, and the consumer must accept whatever price the retailer places on the product, and cannot purchase from other sources, or reduce his use of the product, then the exception may come into play. In that scenario, the direct purchaser simply "passes through" all of the loss to the consumer.

However, the "pre-existing cost-plus contract" exception must be narrowly construed. The *Illinois Brick* Court examined the strict limits of the exception:

> But this Court in Hanover Shoe [, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231] indicated the narrow scope it intended for any exception to its rule barring pass-on defenses by citing, as the only example of a situation where the defense might be permitted, a pre-existing cost-plus contract. In such a situation, the purchaser is insulated from any decrease in its sales as a result of attempting to pass on the overcharge, because its customer is committed to buying a fixed quantity regardless of price. The effect of the overcharge is essentially determined in advance, without reference to the interaction of supply and demand that complicates the determination in the general case. The competitive bidding process by which the concrete block involved in this case

was incorporated into masonry structures and then into entire buildings can hardly be said to circumvent complex market interactions as would a cost-plus contract.

*Illinois Brick* at 431 U.S. 735-36.

As this Court said, this exception is of "narrow scope." It has been outlined thusly:

> The cost-plus contract exception is thus a fragile principle grounded in law and economics. In essence, the exception involves three essential elements; first, that there exists an automatic pass on to the full extent of the overcharge to indirect purchasers; second, that the direct purchaser is insulated from any decrease in sales or profit; and third, that a contract exists which commits the indirect purchaser to buying a fixed quantity regardless of price. [citing cases] Thus, the cost-plus exception has been found to mean that the purchaser-seller's profit is guaranteed and controlled by a contract rather than by relatively unascertainable economic conditions. Under such circumstances, the overcharge must be passed-on automatically to the buyer with whom the purchaser-seller has his cost-plus contract and the quantity of sales and profits must remain constant despite the overcharge.
>
> *Lefrak v Arabian American Oil Co.*, 487 F.Supp. 808, 819 (E.D.N.Y. 1980), emphasis added.

The Petitioners try to fit within the same "pass-through" analysis. However, they fail to succeed on any of their points. We will take the points in turn, as they were numbered in *Lefrak*:

1. "[T]here exists an automatic pass on to the full extent of the overcharge to indirect purchasers." Although Petitioners want to assure the Court that cigarette distributors and retailers will automatically pass on all of the price increases assumed from the tobacco companies, there is nothing "automatic" about it. Under a cost-plus contract, the price pass-through is mechanical and automatic. However, a cigarette distributor or retailer can chose to pass on some, none, or all of its extra expenses to its customers.

2. "[T]hat the direct purchaser is insulated from any decrease in sales or profit." Cigarette distributors are not insulated from any decrease in sales or profit as a result of the price increase. If the cigarette distributors were under "cost-plus" contracts, they would have a legal mechanism to ensure that they would sell just as many cigarettes after the price hike as they did before, with a guaranteed profit for each pack. Plaintiffs can show no such arrangement between cigarette distributors and consumers. Consumers are free to cut down on the number of packs they purchase as the price goes up. Further, since the cost increase of tobacco does not necessarily "pass-through" to the consumer, the amount of profit per cigarette can change based on supply and demand. The distributor is still exposed to the possibilities that both the number of cigarettes sold, and the profit per cigarette, may have to change in response to consumer response.

3. "[T]hat a contract exists which commits the indirect purchaser to buying a fixed quantity regardless of price." Of course, no such contract exists. American consumers are not contractually bound to buy a fixed number of cigarettes, regardless of price.

Allowing the case at bar to escape the *Illinois Brick* wall would defeat the very purposes of the *Illinois Brick* case. The manufacturers, if they were guilty of antitrust violations, would be subject to possible multiple lawsuits from distributors and from consumers. Each would seek recovery of some unidentifiable portion of the same price increase. The Court cannot merely presume that economics requires the cigarette distributors to increase their prices in lock-step with the tobacco companies.

**2. Response to Petitioner's "*Noerr-Pennington*" argument: The *Noerr-Pennington* doctrine does not require "state action." It does not matter whether the government takes any action or not; what matters is that the Defendants are immunized because they are seeking governmental action or redress, either directly, or through the Courts.**

The "Noerr-Pennington doctrine" arose out of two cases. See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 135-38 (1961) (establishing immunity for petitions to state legislature); and United Mine Workers of America v. Pennington, 381 U.S. 657, 670 (1965) (extending Noerr immunity to petitions of public officials). The District Court properly noted that the Noerr-Pennington doctrine, "holds generally that a private entity's right to petition the government, including the judiciary, is immune from federal antitrust claims, regardless of any anti-competitive intent or consequences, unless such conduct or action is a 'sham.'" App. 7 The District Court held that the Defendants were privileged to settle its case with the States, because the settlement process was simply part of the Defendants' right to petition the government and was protected under Noerr-Pennington.

Petitioners argue that *Noerr-Pennington* can not apply because the various Attorneys General were acting outside their authority in entering the settlement. This simply is not so, but neither is it relevant. We see nothing in the *Noerr-Pennington* doctrine that requires Respondents to prove that the government agency they were "petitioning" actually had the authority to take the action that it eventually took. It would unduly restrict the doctrine to require the Defendant to defend the "jurisdiction" of the governmental entity that was being petitioned.

The settlement process was equated with the litigation process in *Columbia Pictures Industries, Inc. v Professional Real Estate Investors, Inc.*, 944 F.2d 1525, 1528 (9th Cir., 1991), aff'd, 508 U.S. 49, 113 S.Ct. 1920, 123 L.Ed.2d 611 (1993).

> On the facts of this case, PRE's request for licensing amounted to an offer to settle the lawsuit. If Columbia Pictures agreed to license PRE, the lawsuit would be moot.
>
> A decision to accept or reject an offer of settlement is conduct incidental to the prosecution of the suit and not a separate and distinct activity which might form the basis for antitrust liability.

This Court affirmed the Ninth Circuit in Professional Real Estate Investors, Inc. v. Columbia Pictures, Inc., 508 U.S. 49, 60-61, 113 S.Ct. 1920, 123 L.Ed.2d 611 (1993). It is apparent that a settlement agreement, that arises out of litigation, would be protected under the Noerr-Pennington doctrine, to the same extent that the underlying litigation would.

In short, the Defendants had a First Amendment right to enter into this settlement. Similarly, each State probably has "right to petition" clauses, similar to Oklahoma's (Oklahoma Constitution, Art. 2, §3) which give rights similar to the First Amendment, and from which similar privileges arise. *Gaylord Entertainment Co. v Thompson*, 958 P.2d 128 (Okla. 1998).

The Defendants have more than a "double shot" of such rights in this case, because they are "petitioning" on three levels in the underlying suit. On one level, by defending the underlying lawsuits, they were "petitioning" the various State courts to protect them from the claims of the various States. They had a First Amendment right to do this, and to defend these claims. On another level, when it came time to settle the cases, the tobacco companies' opponents were the various State governments themselves. The cases were being prosecuted by the various States. Therefore, the settlement negotiations, and the resulting settlements, were the result of "petitioning" the various governmental plaintiffs to settle their claims against the tobacco companies. Finally, for a third level, the cases were ultimately settled after the parties sought approval of the settlement agreements, by consent decree, from the various State courts. Plaintiffs' suit seeks redress against these private Defendants because they participated in a <u>successful</u> attempt to procure a court order! Plaintiffs' suit is a collateral attack on that underlying judgment approving the settlement.

The Defendants had an objectively reasonable belief that they had the right to settle, under the agreement set forth in the MSA. Although Plaintiffs make some novel (the District Court

said the Plaintiffs were "without any authority whatsoever", Aplt.App. 495) arguments, they are not exactly arguments that are obvious on the face of the MSA. If the Defendants asked this Court for permission to enter into the MSA, would this Court sanction the Defendants under Fed. R. Civ. Pro., Rule 11? Obviously, this Court would not. It simply was not objectively unreasonable for these Defendants to believe that the MSA was a legally valid settlement agreement, and well within their First Amendment rights to agree to, and to seek court approval of, under the *Noerr-Pennington* doctrine.

**3. Response to the Petitioner's "illegal compact" argument. This argument is totally without merit and is being made for the first time on appeal. Plaintiffs now pursue, on appeal, a constitutional theory that is completely new to the annals of law, as well as completely new to this case.**

**A) This theory can not be pursued on appeal because it was not argued in the trial court.**

Throughout this litigation, the Plaintiffs have complained that the States, and the Defendants, had entered into an unconstitutional "confederation," in violation of Article 1, Sec. 10, cl. 1 of the United States Constitution. App. 18-19. This clause, emphasis added, reads:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal;...

The Plaintiffs have consistently argued that the MSA was invalid because the signatory States were bonding together, into an illegal "confederation," to form an illegal "de facto government"

that purports to regulate tobacco manufacture and sales. This "de facto" government theme is found in their original Complaint, at Aplt.App. pg. 14.

During the Motion to Dismiss/Summary Judgment, the Plaintiffs characterized their constitutional arguments as an attack under Article 1, Sec. 10, cl. 1 of the Constitution. They claimed that "The parties to the MSA have formed an unlawful confederation in violation of U.S. Const. Article 1, §10, cl. 1..." Aplt.App. pg. 419. Further, they darkly warn that, "Once the MSA procedure is accepted and legitimized there may be no end to the intrusion of separate confederations of states formed and administered for the purpose of regulation and taxation of lawful commercial activities within the United States." Aplt.App. pg. 420. Judge Cook, in his April 29, 1999 Order, also thought that the issue was whether the states had entered into an "unlawful confederation" and had formed a "de facto government." App. 502.

Now that we get on appeal, we find that the Constitutional argument has shifted. Now we find out that the MSA was really an "illegal interstate compact prohibited by the United States Constitution Art. 1, §10, Clause 3 which provides: 'No state shall without the consent of Congress ... enter into any agreement or compact with another state...'" Petition 20.

It is a long-settled tenant of law that an appellant can not change theories of recovery on appeal and expect to get a hearing. An appellant will not be allowed to argue, on appeal, an entirely different theory than that presented to the trial court. *Singleton v Wulff*, 428 U.S. 106, 121, 96 S.Ct. 288, 2877, 49 L.Ed.2d 826

(1976)[citing the general rule, and noting that the appellate court is well within its discretion to refuse to listen to such arguments]; *Polin v Dun & Bradstreet, Inc.*, 511 F.2d 875 (10th Cir. 1975) [Plaintiff can not, on appeal, argue for a theory of recovery that was not argued in the trial court.]; *Tele-Communications, Inc. v. C.I.R.*, 104 F.3d 1229, 1233 (10th Cir. 1997). As the Tenth Circuit held in *Tele-Communications, Inc.*:

> This rule is particularly apt when dealing with an appeal from a grant of summary judgment, because the material facts are not in dispute and the trial judge considers only opposing legal theories. Anschutz Land and Livestock Co., Inc. v. Union Pac. R.R. Co., 820 F.2d 338, 344 n. 5 (10th Cir.1987). Propounding new arguments on appeal in an attempt to prompt us to reverse the trial court undermines important judicial values. In order to preserve the integrity of the appellate structure, we should not be considered a "second-shot" forum, a forum where secondary, back-up theories may be mounted for the first time. Id. Parties must be encouraged to "give it everything they've got" at the trial level. Id. Thus, an issue must be " 'presented to, considered [and] decided by the trial court' " before it can be raised on appeal. See Lyons 994 F.2d at 721 (quoting Cavic v. Pioneer Astro. Indus., 825 F.2d 1421, 1425 (10th Cir.1987)) (alteration in original).

The same decision made clear that appellants would not be allowed to make vague references to a theory in the trial court, or leave a

theory "undeveloped," and then pursue that theory on appeal. Id. at 1233.

That is exactly what has happened here. In the trial court, Plaintiffs argued that the States had formed a "confederation," similar to the Civil-War Confederacy [Aplt.App. pg. 480], and were acting as a "de facto government," presuming to levy taxes, and assuming regulation over an industry. Plaintiffs carefully detailed all of the similarities between the "MSA Confederacy" and a true government (constitution, laws, branches, courts, taxes, treasury, regulation). Aplt.App. pg. 419. They argued that this constituted an "illegitimate government." Aplt.App. pg. 420. Such are the arguments that become necessary when trying to prove an actual "confederacy" under Art. 1, §10, cl. 1.

This is a far cry from the "compact clause" argument taken from Art. 1, §10, cl. 3. The Plaintiff shifts from trying to prove an illegal shadow government and begins arguing merely that the States entered into an illegal contract (compact). An interstate compact is merely a contract between the states. *Texas v New Mexico*, 482 U.S. 124, 107 S.Ct. 2279, 96 L.Ed2d 105, opn. after remand, 485 U.S. 388, 108 S.Ct. 1201, 99 L.Ed.2d 450 (1987). There has been only one "confederacy" in our history, and that confederacy brought us war. However, our governmental history is replete with interstate "compacts," and none of those compacts have brought us to civil war yet. The point being, of course, that there is a vast difference between arguing that state action constitutes a "confederacy" under clause 1, and arguing that it is a "compact" under clause 3. Plaintiffs simply cannot make this argument on appeal, as it was not argued in the trial court.

**B) The MSA does not violate the "compacts" clause.**

The various States filed the subject lawsuits as an attempt to recover healthcare costs that they had provided to their citizens and that they claimed related to smoking cigarettes. This is an act that the States would argue that they had a right to do under their parens patriae power.

> In fact, it has long been recognized that, under the parens patriae power, a state may initiate a lawsuit seeking injunctive or monetary relief where the claims are based on an alleged wrong to the general welfare of its citizenry. See, e.g., Stead v. Fortner, 255 Ill. 468, 478, 99 N.E. 680, 683-684 (1912) ("The public authorities have a right to institute the suit where the general public welfare demands it and damages to the public are not susceptible of computation. The maintenance of the public health, morals, safety, and welfare is on a plane above mere pecuniary damage, although not susceptible to measurement in money, and to say that a court of equity may not enjoin a public nuisance because property rights are not involved would be to say that the state is unable to enforce the law or protect its citizens from public wrongs."); State v. F.W. Fitch Co., 236 Iowa 208, 214, 17 N.W.2d 380, 383 (1945) ("It is a general rule that, independently of any statutory provision, a state may institute a suit in any of its own courts, whether required by its pecuniary interests or the general public welfare."); State v. Ri-Mel, Inc., 417 N.W.2d 102, 112 (Minn.Ct.App.1987) ("[C]ommon law has recognized that

under the doctrine of parens patriae a state may maintain a legal action on behalf of its citizens, where state citizens have been harmed and the state maintains a quasi-sovereign interest."); State v. Kansas City Firefighters Local No. 42, 672 S.W.2d 99, 126 (Mo.Ct.App.1984) ("The right of a state, either as the sovereign or as a political corporation, to sue in any of its courts exists independent of statute... To enforce a right or redress a wrong as a political corporation, the state may have avail of any remedy open to a private suitor - as for instance a tort action for damage to its property."); State v. Chicago & N.W. Ry. Co., 147 Neb. 970, 977, 25 N.W.2d 824, 828 (1947) ("It is a general rule that every government entrusted with powers and duties involving the public welfare has a right to apply to its own courts for any proper assistance in the exercise of one and discharge of another."); People v. Gary M., 138 Misc.2d 1081, 1092, 526 N.Y.S.2d 986, 995 (1988) ("[T]he doctrine of parens patriae imposes an obligation on the part of the State to protect the rights of its citizens."); State v. Hooker, 87 N.W.2d 337, 340 (N.D.1957) ("It has been repeatedly held that the state has the right, independent of any statutory provision, to institute a suit in any of its courts when it is required for the general welfare of its people."); State v. City of Bowling Green, 38 Ohio St.2d 281, 283, 313 N.E.2d 409, 411 (1974) ("[W]here the state is deemed to be the trustee of property for the benefit of the public it has the obligation to bring suit not only to protect the corpus of the trust property but also to recoup the public's loss

occasioned by the negligent acts of those who damage such property.")

*Commonwealth v Phillip Morris, Inc.*, 736 A.2d 693, 701 (Pa.Cmwlth. 1999), dissenting opinion.

Presuming that the States each had a right to bring their individual actions against the tobacco companies, it then stands to reason that the States also had the right and power to bring those actions to a conclusion. Acting under their parens patriae power, each individual State had the right and power to negotiate and receive a settlement with the underlying tobacco defendants. Otherwise, how would the States ever "recoup the public's loss occasioned by the negligent acts of those who damage" the public treasury?

Certainly, no matter what the merits of the actions, the States would argue that they had the right to bring their individual actions against the tobacco companies. Further, the States had the right to settle their individual claims against the tobacco defendants. There is no doubt that they could do so, individually, under this settlement agreement, without offending Art. 1, §10, cl. 3, because, with no other States being involved in the agreement, there is no way it could offend the "compact" clause.

Therefore, Plaintiff's only possible complaint is that the Defendants settled with several States, under <u>combined</u> settlement documents. Plaintiff's only way to win under its Art. 1, §10, cl. 3 arguments is to somehow show that this group of States could not do, under one document, what they obviously could do under several separate documents.

This points out the primary weakness in Plaintiff's "compact" arguments: the agreement in question is not so much between the various States as it is between each State and the tobacco companies. Substantially the same agreement could have been worked out by each of the separate States. The fact that they all happen to be grouped into the same settlement document is of little moment. Plaintiffs show us no authority that such a group of individual settlement contracts, clustered under one umbrella, is illegal.

Further, the Plaintiff ignores the fact that the MSA was confirmed by a "Consent Decree and Judgment" entered into by each of the respective state courts. For example, the Oklahoma litigation was settled, not by the MSA, but by the Consent Decree and Final Judgment, Aplt.App. pg. 60. In other words, the Plaintiffs are not seeking to hold an "agreement" invalid, but are attacking the very validity of a whole series of state court decrees. In effect, Plaintiffs are attempting to make a collateral attack on approximately 40 state court judgments, and doing so by only suing one of the two sides of these multiple lawsuits.

Plaintiffs have presented no authority that the Judgments, entered by the individual various state courts, would qualify as a single "compact" between the various states. The MSA was not binding unless, and until, it was approved by the various state courts involved. The enforcement of the consent decree is by seeking an "Enforcement Order," and ultimately "an order for interpretation or for monetary, civil contempt or criminal sanctions to enforce compliance with such Enforcement Order." Obviously, this is more than a mere "contract" (compact). Rather, the MSA

rises to the dignity of a court order, which can be enforced by contempt and criminal sanctions. Plaintiffs present no authority that such a court order can be construed as a mere "compact."

In short, the Plaintiffs' "compact" theory is undeveloped (probably because it appears to be an afterthought and was not truly litigated in the district court) and supported by absolutely no authority.

**4. There was no "rush to judgment" here. Plaintiff was aware of the factual assertions that Defendants had made; Plaintiff had the same opportunity to present counter-factual assertions as the Defendants did. In any event, the factual assertions presented by the Defendants (unopposed by Plaintiffs) were based almost exclusively on the settlement agreement itself, which was attached to the Motion.**

Plaintiffs complain that they were not "on notice that she had to come forward with all of her evidence" after the Trial Court "converted" the Motion to Dismiss into a Motion for Summary Judgment. Petition, pg. 25. That is puzzling, since the Trial Court issued a specific and pointed Order giving notice of the "conversion," and allowing Defendants to submit additional evidence, and giving Plaintiffs "fifteen days to respond thereto." App. 27. Instead of using the opportunity to submit any additional facts that Plaintiffs felt were relevant, Plaintiff simply complained about the "format" of the Defendant's submission (they complained that Defendant's facts were not numbered).

This Court has said that a Trial Court can "enter summary judgment sua sponte, so long as the losing party was on notice that she had to come forward with all of her evidence." *Celotex Corp.*

*v Catrett*, 477 U.S. 317, 326 (1986). The Tenth Circuit has adopted a reasonable and protective set of procedural requirements for giving such notice, and protecting the rights of the non-moving party.

A Motion to Dismiss can be "treated as" a Motion for Summary Judgment under Rule 12(b). Rule 12(b) says:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

In *Brown v Zavaras*, 63 F.3d 967 (10th Cir. 1995), the Court held that, after a Motion to Dismiss is converted to a Motion for Summary Judgment, the trial court should (a) give notice of the changed status, and (b) provide the parties the opportunity to present to the court all material made pertinent to such motion by Rule 56. Nothing in Brown, nothing in Rule 12(b), and nothing in Rule 56, requires that the movants actually restructure and refile their original Motion to separately number "undisputed facts."

Rule 12(b) does not say so, nor does Rule 56, or *Brown*, but Plaintiff would apparently also require us to abandon our original Motion and Brief, and to refile it all, re-couched in the format of a Motion for Summary Judgment. Further, Plaintiff would have us take that format, not from Rule 56 (which says

nothing of numbering facts), but from Local Rule 56.1A. Much could be said as to whether this is "preferable." But Plaintiffs must admit that such a procedure would go beyond the strict terms of Rule 12(b), Rule 56, or *Brown*. It certainly exceeds the pure "notice" requirement set forth in *Catrett*.

Rather, the plain requirements are much simpler. If the movant so wishes, the movant is allowed to supplement its Motion to Dismiss with citations to facts outside the four corners of the pleadings. The party responding to the motion has the same opportunity.

Plaintiff complains that, because we failed to separately list and number a long series of facts, that they missed the opportunity to comply with Local Rule 56.1B (requiring the response brief on Summary Judgment to separately list facts in dispute). Aplt. Brief, pg. 10. Local Rule 56.1B says:

> The response brief to a motion for summary judgment (or partial summary judgment) shall begin with a section which contains a concise statement of material facts as to which the party contends a genuine issue exists. Each fact in dispute shall be numbered, shall refer with particularity to those portions of the record upon which the opposing party relies, and, if applicable, shall state the number of the movant's fact that is disputed. All material facts set forth in the statement of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of the opposing party.

A review of Plaintiff's "Supplemental Submission" (beginning at Aplt.App. 474) shows that Plaintiff chose not to take the opportunity to make a "concise statement of material facts" that are in dispute. The Local Rule only requires Plaintiff to refer to Defendant's "numbers" when such is "applicable." Of course, in the case at bar, since the Defendant had not listed such numbers, then the Plaintiff would not have been required to respond in that fashion. However, whether the facts were separately numbered or not, the Plaintiff still had the opportunity to make its own list of disputed facts. The "portions of the record upon which the [Defendant] relies" was self-evident (see the "Facts" section of the Motion to Dismiss, at Aplt.App. 36-37, and accompanying documents). If Plaintiff disputed the authenticity of any of these facts or documents, Plaintiff was well able to say so in Plaintiff's Supplemental Submission, and to produce documents or affidavits to dispute the Defendants' facts. Plaintiffs chose not to introduce any further information.

We do not believe that Local Rule 56.1 was violated. However, since Local Rule 56.1 contains requirements that go above and beyond the requirements of Rule 56, it would seem well within a Trial Court's discretion to dispense with these requirements if it so chose. *Silberstein v I.R.S.*, 16 F.3d 858 (8th Cir. 1994) [district court has considerable leeway in application of its local rules.] A District Court is not "bound" by it's local summary judgment rules. *Guerrero v American-Hawaiian Steamship Co.*, 222 F.2d 238, 245 (9th Cir. 1955). In fact, requirements in local rules that contravene, or place more stringent requirements than, the Federal Rules of Civil Procedure are invalid under Fed.R.Civ.Pro. Rule 83.

Plaintiffs have not pointed to one "disputed fact" that they were supposedly prevented from asserting in the Trial Court as a result of the procedure used. They may have failed to present disputed facts, but it was not because they did not have the chance. They were given the same chance that Defendants had to present to the Court all pertinent materials that may have shown a disputed fact. This is all that is required under *Catrett*, under the Rule, and under *Brown*. The Trial Court's procedure was fair and the case should not be reversed on these grounds.

Plaintiffs also charges the lower court of "railroading," and set up three "issues." Plaintiffs say that these issues need to be "addressed," (Petition, pg. 26) but they then leave us with no real framework to do so. However, we will attempt to do so anyway.

1. *May the lower court favor one party over another in the application of procedural rules?* As an abstract question, it sounds like the answer should be "no." However, in the setting of this case, this question does not help the Plaintiffs. Both parties were told what the rules were: this Motion to Dismiss is now a Motion for Summary Judgment; if there are additional factual issues that you wish to present to the court, do so within the time specified. The same "rule" was applied to both sides. There is no indication that one side was favored over another.

2. *May the lower court rely upon undocumented self-serving declarations and conclusions, rather than 'ultimate facts', in support of summary judgment?* Plaintiffs do not bother to tell us what "self-serving" facts the Court relied upon. Neither do they tell us what "ultimate facts" the Court should have relied upon. Nor do they define the phrase "ultimate fact." If there were certain

"ultimate facts" that the Plaintiffs wanted the Trial Court to rely upon, Plaintiffs had a chance to point them out.

3. *Must a party, in response to a motion for summary judgment, address all possible permutations which might be derived from the adverse parties argument or exhibits prepared in contemplation of litigation, or must a party address only 'ultimate facts' supported by reliable evidence in the form of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits.' [Fed.R.Civ.P. 56(c)]?* Again, if the Trial Court was guilty of concentrating on unsupported "permutations," no particular "permutations" are specified by the Plaintiffs, so we do not know how to respond to this assertion.

Plaintiffs' "rush to judgment" argument makes vague references to a general failure to allow discovery. Yet, the parties stipulated that discovery would be stayed until after the Motions were ruled on. Petition, pg. 23. Further, Plaintiffs knew that, if justice required further discovery prior to a ruling on the Motions, the Plaintiffs were within their rights to request that the ruling be stayed pending further discovery. Fed.R.Civ.P. 56(f). The Court made the provisions of Rule 56 available to the Plaintiffs, but Plaintiffs failed to make any Rule 56(f) motion. This case was pending in the Trial Court for five full months. The "rush to judgment" argument should fail.

**CONCLUSION.**

This is a novel case. But it is novel only because it is making assertions that are supported nowhere in our substantive or procedural law. Plaintiffs/Petitioners have been given every

opportunity to state a valid claim and have only been able to skip from one unsupportable ramble to another. This Court should refuse Certiorari.

Respectfully submitted,

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